

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERBERT ZINZ,

Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY (LIMITED), THE
CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK INC. and OPTICAL
COMMUNICATIONS, INC.,

Docket No.
13CV4415
(LGS)

Defendants.

**DEFENDANTS' JOINT STATEMENT OF UNDISPUTED
FACTS PURSUANT TO LOCAL CIVIL RULE 56.1**

**CONWAY, FARRELL, CURTIN
& KELLY, P.C.**

By: 

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HERBERT ZINZ,

Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY
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CONSOLIDATED EDISON COMPANY OF
NEW YORK INC. and OPTICAL
COMMUNICATIONS, INC.,

Defendants.
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**DEFENDANTS' JOINT
STATEMENT OF
UNDISPUTED MATERIAL
FACTS**

Docket No. 13CV4415 (LGS)

Law Dept. No. 2013-054667

The Defendant ECS submits this joint statement pursuant to Rule 56.1 of the Local Civil Rules of the United States District Court for the Southern District of New York, to set forth material facts as to which it contends there are no genuine issues to be tried:

1. Plaintiff initially filed this action on June 25, 2013, against Defendant Empire City Subway Company (Limited) asserting a cause of action for negligence. See Declaration of Bradley M. Wanner dated August **, 2014 ("Wanner Decl."): Exhibit B (Complaint). Plaintiff filed an Amended Complaint on November adding as Defendants the City, Consolidated Edison Company of New York, Inc. and Optical Communications, Inc. See Wanner Decl.: Exhibit C (Amended Complaint).

2. On March 30, 2013, at approximately 5:30 P.M., Plaintiff, a resident of Florida, tripped and fell in the southeast corner of the intersection of Broadway and Spring Street in Manhattan. See Wanner Decl.: Exhibit A (Notice of Claim); Exhibit E, Page 9 (Plaintiff's 50-h Hearing); Exhibit F, Pages 5, 7 and 12 (Plaintiff's Deposition).

3. The hole that caused Plaintiff's fall was in the intersection, not within the crosswalk. See Wanner Decl.: Exhibit F, Page 16.

4. In a photograph, Plaintiff circled the location of the hole that caused his fall as outside the painted crosswalk. See Wanner Decl.: Exhibit E, Pages 34-35 and Exhibit "B."

5. A search by the New York City Department of Transportation ("DOT") for records for the intersection of Broadway and Spring Street for a period of two years up to and including the date of Plaintiff's fall produced one corrective action request ("CAR"), four inspection records, five maintenance and repair records, two complaints, five gang sheets, two Big Apple Maps and a legend for the Big Apple Map. See Wanner Decl.: Exhibit G (City's Initial Disclosure Pursuant Fed. R. Civ. P. 26); Exhibit J, Page 19 (Deposition of Danny Garcia).

6. The records located in the two year search described above, other than the Big Apple Map and its legend, were created by the DOT and maintained in the DOT's ordinary course of business. See Wanner Decl.: Exhibit J, Page 15.

7. The two complaints, identified by service request numbers 1-1-662857989 and 1-1-744492921, were reported through the City's 311 Call Center. See Wanner Decl., Exhibit G, Pages 99 and 106; Exhibit J, Page 21.

8. The complaint identified by service request number 1-1-744492921, received on April 24, 2012, was for a noise condition. See Wanner Decl.: Exhibit G, Page 106; Exhibit J, Pages 21-22 and 43.

9. An inspection in response to this complaint determined Empire City Subway ("ECS") to be the responsible party and the issuance of a Notification of Immediate

Corrective Action (“NICA”) to ECS. See Wanner Decl.: Exhibit G, Pages 107-108; Exhibit J, Pages 42-43.

10. The complaint identified by service request number 1-1-662857989, received on June 25, 2011, was for a cut in the roadway on Spring Street between Broadway and Lafayette Street. See Wanner Decl.: Exhibit G, Page 99; Exhibit J, Page 22.

11. An inspection in response to this complaint determined Con Ed to be the responsible party and the issuance of a NICA to Con Ed. See Wanner Decl.: Exhibit G, Pages 100-101; Exhibit J, Pages 23 and 26; Exhibit K, Page 36.

12. Upon re-inspection on June 28, 2011, the condition was found repaired. See Wanner Decl.: Exhibit G, Page 100; Exhibit K, Page 39.

13. An inspection by DOT’s Highway Inspection and Quality Assurance (“HIQA”) Unit on July 30, 2011, led to the issuance of a CAR to ECS for broken asphalt around two manhole covers in the southwest corner of the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Pages 96-97; Exhibit J, Pages 34-35; Exhibit K, Pages 27-28 (Deposition of Victor Green).

14. Upon re-inspection on November 12, 2011, a “pass” was noted by the HIQA inspector, meaning that the condition that resulted in the CAR was rectified. See Wanner Decl.: Exhibit G, Page 96; Exhibit J, Page 36; Exhibit K, Page 29.

15. On April 26, 2012, a NICA was issued to ECS for an exposed cut and shifted plate in need of ramping and pins. See Wanner Decl.: Exhibit G, Page 102; Exhibit J, Page 52.

16. This condition was located on Spring Street between Greene Street and Mercer Street. See Wanner Decl.: Exhibit G, Page 102; Exhibit K, Pages 39-40.

17. The segment of Spring Street between Greene Street and Mercer Street does not include the intersection of Spring Street and Broadway. See Wanner Decl.: Exhibit N (Google Map).

18. Upon re-inspection the same day, the condition was found repaired. See Wanner Decl.: Exhibit G, Page 102; Exhibit J, Pages 52-53.

19. The maintenance and repair reports, also known as “FITS reports,” are generated by DOT based on complaints of conditions in the roadway. See Wanner Decl.: Exhibit G, Pages 117-136; Exhibit L, Pages 5-6 (Deposition of Gre-Talan Oneza).

20. A repair status of “XCL” or “closed” on a FITS reports indicates that the condition was repaired. See Wanner Decl.: Exhibit L, Pages 7, 11 and 62.

21. DOT classifies potholes by size as either “A” (small), “B” (medium) or “C” (large). See Wanner Decl.: Exhibit L, Page 10.

22. The FITS report identified by defect number DM2011105073 was received by DOT on April 15, 2011, for a pothole in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Page 117; Exhibit L, Pages 6-8.

23. In response to this FITS report, on May 24, 2011, a DOT crew repaired five “A” class potholes and five “B” sized potholes. See Wanner Decl.: Exhibit G, Pages 118-119; Exhibit L, Pages 8 and 10-11.

24. The FITS report identified by defect number DM2011123008 was received by DOT on May 2, 2011, for a condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Page 121; Exhibit L, Page 13.

25. In response to this FITS report, on May 2, 2011, a DOT crew repaired six “A” class potholes and six “B” class potholes. See Wanner Decl.: Exhibit G, Pages 122-123; Exhibit L, Pages 14 and 16-17.

26. Additionally, the DOT crew found a cut in the roadway that they “made safe” with asphalt. See Wanner Decl.: Exhibit G, Pages 122-126; Exhibit L, Pages 15-16.

27. The FITS report identified by defect number DM2012331027 was received by DOT on November 25, 2012, for a condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Page 125; Exhibit L, Page 20.

28. In response to this FITS report, on November 26, 2012, a DOT crew repaired three “A” class potholes. See Wanner Decl.: Exhibit G, Pages 126-127; Exhibit L, Pages 21 and 23.

29. The FITS report identified by defect number DM2012341008 was received by DOT on December 4, 2012, for a condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Page 129; Exhibit L, Page 24.

30. In response to this FITS report, on December 5, 2012, a DOT crew repaired 10 “A” class potholes. See Wanner Decl.: Exhibit G, Page 130; Exhibit I, Page 5 (City’s supplement to its Initial Disclosure Pursuant to Fed. R. Civ. P. 26); Exhibit L, Page 24.

31. The FITS report identified by defect number DM2013010018 was received by DOT on January 8, 2013, for a condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit G, Page 133; Exhibit L, Pages 27-28.

32. In response to this FITS report, on January 9, 2013, a DOT crew repaired five “A” class potholes and one “B” class pothole. See Wanner Decl.: Exhibit G, Page 134; Exhibit I, Page 11; Exhibit L, Page 28.

33. An additional search by DOT for records for the intersection of Broadway and Spring Street for a period of three years up to and including March 29, 2011, produced eight permits, three CARs, 10 inspection records, nine complaints, two Big Apple Maps and a legend for the Big Apple Map. See Wanner Decl.: Exhibit H (City's Response to Defendant Empire City Subway Company (Limited)'s Notice to Produce); Exhibit M (Affidavit of Danny Garcia).

34. Three permits, identified by permit numbers M01-2008196-034, M01-2010107-025 and M01-2010138-015, were issued to Con Ed on July 14, 2008, April 17, 2010, and May 18, 2010, respectively, to perform work in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Pages 1-9.

35. An inspection on January 25, 2009, in regards to permit number M01-2008196-034 resulted in a "pass." See Wanner Decl.: Exhibit H, Page 19.

36. An inspection on May 18, 2010, in regards to permit number M01-2010107-025 found the "work not started." See Wanner Decl.: Exhibit H, Page 21.

37. An inspection on September 2, 2010, in regards to permit number M01-2010138-015 resulted in a "pass." See Wanner Decl.: Exhibit H, Page 22.

38. A permit, identified by permit number M01-2010279-101, was issued to Optical Communications Group on October 6, 2010, to perform work in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Pages 10-12.

39. An inspection on November 7, 2010, in regards to permit number M01-2010279-101 resulted in a "pass." See Wanner Decl.: Exhibit H, Page 23.

40. Two permits, identified by permit numbers M15-2009056-016 and M15-2009056-053, were issued to the City on February 25, 2009, to perform milling and resurfacing in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Pages 13-14.

41. Two permits, identified by permit numbers M15-2009075-012 and M15-2009075-054, were issued to the City on March 16, 2009, to perform milling and resurfacing in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Pages 15-16.

42. An inspection on February 6, 2010, resulted in the issuance of a CAR to Con Ed for broken concrete around a Con Ed manhole cover. See Wanner Decl.: Exhibit H, Pages 26-27.

43. A re-inspection on May 28, 2010, resulted in a “pass.” See Wanner Decl.: Exhibit H, Page 26.

44. A complaint, identified by service request number 1-1-513183232, received on October 2, 2009, was for a street condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 29.

45. As a result of this complaint, an inspection on October 6, 2009, resulted in the issuance of a CAR to Con Ed for broken asphalt around a manhole cover in the northeast corner of the intersection. See Wanner Decl.: Exhibit H, Pages 19-20.

46. A re-inspection on May 28, 2010, resulted in a “pass.” See Wanner Decl.: Exhibit H, Page 19.

47. Two complaints, identified by service request numbers 1-1-541239748 and 1-1-541618060, received on February 9, 2010, and February 10, 2010, respectively, were for a condition in the crosswalk in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Pages 30-31.

48. As a result of these complaints, an inspection on February 11, 2010, resulted in the issuance of a CAR to the Department of Environmental Protection (“DEP”) for a

missing valve cover and broken asphalt in the crosswalk. See Wanner Decl.: Exhibit H, Pages 24-25.

49. The CAR was closed by DEP on February 18, 2010. See Wanner Decl.: Exhibit H, Page 25.

50. A complaint, identified by service request number 1-1-558039536, received on April 17, 2010, was for a loose manhole in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 32.

51. Based upon this complaint, a CAR was issued to Con Ed for a defective S-7 utility box. See Wanner Decl.: Exhibit H, Page 32.

52. A complaint, identified by service request number 1-1-560677312, received on April 28, 2010, was for a reported cave-in around a grating in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 33.

53. Based upon this complaint, a NICA was issued to Con Ed for broken pavement around an S-5 box. See Wanner Decl.: Exhibit H, Page 33.

54. A complaint, identified by service request number 1-1-582768837, received on August 5, 2010, was for a condition 20 feet east of the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 34.

55. Based upon this complaint, no defect was located. See Wanner Decl.: Exhibit H, Page 34.

56. A complaint, identified by service request number 1-1-599048331, received on October 8, 2010, was for “damage” in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 35.

57. Based upon this complaint, a pothole was noted. See Wanner Decl.: Exhibit H, Page 35.

58. A complaint, identified by service request number 1-1-630896480, received on February 23, 2011, was for a portion of asphalt broken out around an ECS manhole cover in the southeast corner of the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 36; Exhibit K, Pages 49-50.

59. A complaint, identified by service request number 1-1-639494981, received on March 25, 2011, was for a condition in the intersection of Broadway and Spring Street. See Wanner Decl.: Exhibit H, Page 37.

60. Based upon this complaint, the condition was referred to the maintenance unit under defect number DM2011050073. See Wanner Decl.: Exhibit H, Page 37.

61. The Plaintiff testified that he did not see the pothole before he stepped into it. John Decl., Exhibit E at page 28.

62. The Plaintiff was asked at his 50H hearing to place an X on a photograph depicting the hole to indicate the spot where he tripped, and could not comply. John Decl., Exhibit E at page 34, 35. John Decl., Exhibit E at page 35.

63. The Plaintiff testified at his 50H that the hole that caused his fall was an 18 inch to 20 inch square shaped hole. John Decl., Exhibit E at page 28, 29.

64. According to the Plaintiff's Notice of Claim, the hole was a rectangle that is 26 inches by 33 inches. John Decl., Exhibit H.

65. The Plaintiff testified at his 50H hearing that he did not know the distance between the ECS manhole cover and the hole. John Decl., Exhibit E at page 36, 37.

66. The plaintiff has produced a post-accident photograph taken by his attorney depicting a roadway repair with a tape measure placed between the edge of the repair and the ECS manhole cover showing 10 inches. See John Decl., Exhibit I.

67. Mr. Bradley Ickes of Defendant Optical testified that the subject defect is a roadway cut containing a failed trench that runs in an east-west direction. See John Decl., Exhibit L at page 34 to 36.

68. Kelly Cassidy of Con Edison testified that there exists a 12 inch gas pipe at the location of the subject defect. See John Decl., Exhibit N at page 17, 33, 34.

69. Patrick Keogh of Con Edison testified that Con Edison performed roadway work at the intersection of Broadway and Spring Street in the areas of the northeast corner, the southeast corner and the northwest corner. See Aviles Declaration dated September 2, 2014, Exhibit A, pages 10, 14, 16.

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By: 

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